

=====

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In re:)	
)	
Puerto Rico Electric)	
Power Authority)	PSD Appeal No. 95-2
(Cambalache Combustion)	
Turbine Project))	
_____)	

[Decided December 11, 1995]

ORDER DENYING REVIEW

***Before Environmental Appeals Judges Ronald L. McCallum and
Edward E. Reich.***

=====

PUERTO RICO ELECTRIC POWER AUTHORITY

PSD Appeal No. 95-2

ORDER DENYING REVIEW

Decided December 11, 1995

Syllabus

Ciudadanos en Defensa del Ambiente (Citizens in Defense of the Environment, hereafter "CEDDA") seeks review of a final prevention of significant deterioration ("PSD") permit issued by U.S. EPA Region II to the Puerto Rico Electric Power Authority (PREPA) for construction of an electric generating station. CEDDA's petition purports to raise issues concerning environmental justice, adequacy of the meteorological data used by the Region, PREPA's history of alleged environmental violations, PREPA's alleged plans to expand the plant, and construction activities undertaken by PREPA prior to issuance of the permit.

Held: CEDDA's petition is so lacking in specificity that it does not meet the standards necessary to invoke Board review of the Region's decision under 40 C.F.R. § 124.19. CEDDA has provided no support for its contention that the lack of an epidemiology study violates the President's Executive Order on environmental justice and the U.S. Constitution, or that the Region erred in addressing environmental justice issues. CEDDA has established no error in the manner in which the Region utilized the meteorological data gathered in preparing the permit. CEDDA has not shown that any alleged history of violations by PREPA are linked to any condition of the present permit. Consideration of any alleged future plans by PREPA to expand the facility are premature, and therefore not appropriate for consideration in this proceeding. Finally, CEDDA has not demonstrated that the Region erred in investigating PREPA's pre-permit construction activities, nor has CEDDA provided any information that non-allowable activities occurred. Even if they had, such activities would normally be addressed in the context of an enforcement action. Review is therefore denied.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Ciudadanos en Defensa del Ambiente (Citizens in Defense of the Environment, hereafter "CEDDA") petitions the Board for review of U.S. EPA Region II's decision to issue a final prevention of significant deterioration ("PSD") permit and approval to construct to the Puerto Rico Electric Power Authority ("PREPA"), pursuant to Clean Air Act § 165, 42 U.S.C. § 7475. The permit authorizes PREPA to construct the Cambalache Combustion Turbine Project ("CCTP"), a 248-megawatt combustion turbine simple cycle electric generating station. The CCTP will be constructed on a 52-acre site in Cambalache, in the municipality of Arecibo, Puerto Rico. The Region issued its final decision granting the permit on July 31, 1995. CEDDA timely filed its petition for review on September 5, 1995.¹

¹PREPA filed a "Motion to Request Denial of Petition for Review" on September 13, 1995, alleging *inter alia* that the petition should be dismissed as untimely. The Region states that "in light of the computation of time requirements * * * Region II does not challenge the timeliness" of the petition. Region's Response to Petition at 2, n.1. We agree with the Region. The Region served its decision on CEDDA by mail on July 31, 1995. In accordance with 40 C.F.R. § 124.19, CEDDA had thirty days within which to file its petition. However, under 40 C.F.R. § 124.20(d) three days are added to the filing period because the Region served the decision by mail. The thirty-third day after service fell on Saturday, September 2, and the following Monday (September 4) was Labor Day, a legal holiday.

(continued...)

CEDDA's two-page letter petition purports to raise several issues for review. CEDDA contends that PREPA and the Department of Health of the Commonwealth of Puerto Rico should have prepared an epidemiology study of the area around the proposed plant, and that failure to do so, or alternatively to impose the burden upon CEDDA to perform a study, violates CEDDA's civil and human rights, in contravention of President Clinton's Executive Order on environmental justice² and the U.S. Constitution. Petition at 1-2. CEDDA also contends that: meteorological data relied upon by the Region in reaching its permit decision do not reflect "reality"; that PREPA has a history of violations that have harmed the community; that PREPA intends to expand the permitted operation to add another 150 megawatts; and that the Region unlawfully allowed PREPA to begin construction of the plant before receiving a permit. Petition at 2.

At the Board's request, the Region submitted a response to the petition together with relevant portions of the administrative record relied upon by the Region in reaching its decision. The Region argues that the petition fails to meet the standards necessary to invoke Board review of its decision, as set forth at 40 C.F.R. § 124.19. For the reasons explained below, we agree and must therefore deny the petition.

Under the regulations that govern the Board's review of PSD permit decisions, review will not be granted unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *see*

¹(...continued)

Therefore, CEDDA had until Tuesday, September 5, to file its petition. *See* 40 C.F.R. § 124.20(c) (when final day of filing period falls on weekend or legal holiday, time period is extended to next working day). We therefore deny PREPA's motion to deny the petition on the ground that it is untimely.

²The President's Executive Order 12898 regarding "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" requires that:

To the greatest extent practicable and permitted by law * * * each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, or activities on minority populations and low-income populations in the United States.

Executive Order § 1-101, 59 Fed Reg. 7629 (Feb. 16, 1994). The Board recently addressed the effect of the Executive Order on the Agency's permitting program under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, in *In re Chemical Waste Management of Indiana*, RCRA Appeal Nos. 95-2 & 95-3 (EAB, June 29, 1995).

In re Masonite Corp., 5 E.A.D. PSD Appeal No. 94-1, slip op. at 8 (EAB 1994); *In re Essex County (N.J.) Resource Recovery Facility*, 5 E.A.D. PSD Appeal No. 93-10, slip op. at 6-7 (EAB 1994). The preamble to § 124.19 states that the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted rests with the petitioner who challenges the Region's permit decision. See 40 C.F.R. § 124.19(a); *Masonite Corp.* at 8; *Essex County* at 6-7.

Further, a petition for review must include "a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period

* * *." 40 C.F.R. § 124.19(a). The Board has explained that in order to establish that review of a permit is warranted, § 124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the Region's previous response to those objections (*i.e.*, the Region's basis for the decision) is clearly erroneous or otherwise warrants review. *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866 (EAB 1993) (citing *In re LCP Chemicals -- New York*, 4 E.A.D. 661, 664 (EAB 1993)); *In re SEI Birchwood, Inc.*, 5 E.A.D. PSD Appeal Nos. 93-11 & 93-12, slip op. at 3 (EAB 1994).

While the Board endeavors to construe petitions broadly, particularly when they are filed by persons unrepresented by legal counsel, the petition in this instance is so lacking in specificity as to why the Region's decision is erroneous that the petitioner has provided the Board with no basis for review. See *Genesee* at 867-868; see also *In re Inter-Power of New York*, 5 E.A.D. Nos. 92-8 & 92-9, slip op. at 28 (EAB 1994) (mere allegation of error does not satisfy requirements of § 124.19). Furthermore, the petition does not identify any specific permit conditions being challenged. *Genesee* at 867-868 (quoting *LCP Chemicals* at 665 ("It is not this Board's obligation to search through the permit for the specific permit conditions that fall into [petitioner's] general category of objections.")).

Petitioner's first objection concerns the alleged failure of PREPA and the Commonwealth's Department of Health to conduct an epidemiology study. Petition at 1. Petitioner states that local doctors provided testimony at the public hearing concerning the treatment of various respiratory diseases that will allegedly be exacerbated by the CCTP, yet no epidemiology study was prepared. Petition at 1. Petitioner asserts in a conclusory fashion that the lack of an epidemiology study, or placing the burden on petitioner to perform a study, violates the President's

Executive Order on environmental justice and the U.S. Constitution.³ The petition does not explain exactly how the Region's decision contravened any applicable requirements of the Executive Order or the Constitution, nor does the petition identify any permit conditions that are implicated by this objection. The only specific reference to epidemiological studies in the Executive Order relates to federal agencies' research activities: "*Environmental human health research*, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies * * *." Executive Order § 3-301(a), 59 Fed. Reg. at 7631 (emphasis added). This mandate does not appear to implicate the type of activity (permit issuance) undertaken by the Region in this case.

Moreover, the Region has explained that it responded fully to environmental justice issues raised during the comment period by ensuring public participation in the permitting process and by performing a comprehensive environmental justice analysis. This included merging and analysis of data from three data bases in the Region's Geographic Information System (GIS) data library. Response to Petition at 10-11. Specifically, the Region explained that:

[T]he following data were utilized: (1) per capita income from the 1990 Census Summary Tape files; (2) source location data contained in the 1990 Toxic Release Inventory; and (3) source location data contained in the Permit Compliance System (PRASA facilities). These data were subsequently geographically plotted for the Arecibo Municipality and for the Island of Puerto Rico as a whole. The location of the proposed facility, maximum emission impact data and monitored meteorological data were then plotted on maps to determine: (1) if the proposed facility was located in a lower income area; and (2) if the maximum emission impacts occurred in areas that were either lower than the Island's or the Arecibo Municipality's per capita income average.

³The Region contends that the petitioner's claims concerning constitutional violations were not preserved for review because they were not raised during the public comment period. Response to Petition at 6. Because petitioner's constitutional claims appear to be interwoven with its environmental justice claim, and environmental justice issues were raised and addressed during the public comment period, it is unclear whether the constitutional claims are being asserted as a distinct basis for objection. In any event, to the extent that they are, they are too vague to justify review. In addition, as the Region has stated, the constitutional claims were not raised during the public comment period by any party, and therefore petitioner lacks standing to raise them in its petition for review.

Id. (citations to administrative record omitted). On the basis of its analysis, the Region concluded that the CCTP would cause no disproportionate adverse health impacts to lower-income populations. *Id.* at 11. The petition does not even facially demonstrate that the Region's methods or conclusions were wrong. Accordingly, review on the basis of this issue must be denied. See *SEI Birchwood* at 3.⁴

Petitioner next contends that "the meteorological data used did not take into consideration that the plant was not buil[t] yet, and therefore they do not represent the reality." Petition at 2.⁵ It is unclear from this statement precisely how the meteorological data relied upon by the Region were inadequate. The Region has explained, and the record supports, that while meteorological data were necessarily gathered prior to construction of the facility (because the permit at issue is a pre-construction permit), the air quality modeling performed by the Region (in which the meteorological data are incorporated) does simulate the presence of the facility post-construction, thereby ensuring that changes in meteorological conditions caused by the new structure are taken into account. Response to Petition at 15-16. The Region's response and the administrative record refute petitioner's unsupported allegation that the presence of the structure was not taken into consideration. Because petitioner has provided no other basis for reviewing the Region's analysis, review of this issue must be denied.

Petitioner alleges that PREPA has a "history of violations * * * which have caused much suffering" to the community. Petition at 2. Petitioner does not describe what these alleged "violations" were, or how such violations may be linked to a condition of the present permit. The Board has explained that "generalized concerns regarding [the permittee's] past [regulatory] violations do not, without more, establish a link to a 'condition' of the present permit * * * and thus do not provide a jurisdictional basis for the Board to grant review." *In re Laidlaw*

⁴The Region asserts that it addressed environmental justice issues in an "appropriate manner" in accordance with the Board's decision in *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeal Nos. 95-2 & 95-3 (EAB, June 29, 1995). Because the petitioner has not made even a facial showing of noncompliance with the Executive Order, it is unnecessary for us to address at length how the Executive Order affects PSD permit decisions, or the extent to which the Region's analysis fulfilled any applicable requirements of the Executive Order.

⁵The Region suggests that this precise issue was not preserved for review. However, the Region acknowledges that comments were received concerning the Region's air quality modeling and the general location for collection of meteorological data, and that it responded to such comments. Response to Petition at 5. Because the issue of meteorological data was generally raised during the comment period, and the Region's response to comments adequately addresses the concerns raised in the petition, we decline to deny review on the basis that this issue was not preserved for review.

Environmental Serv., 4 E.A.D. 870, 882-83 (EAB 1993). Review of this issue must therefore be denied.

Petitioner also claims that PREPA expressed its intent, via a newspaper article dated August 15, 1995, to expand operation of the plant to add another 150 megawatts.⁶ Petition at 2. The Region argues that the alleged statement described by petitioner does not provide any reason to believe an expansion is intended, and that it has confirmed with PREPA that no imminent changes in the facility are planned. Response to Petitions at 19. The Region further argues that any such expansion that affected the conditions of the present permit would be subject to PSD permit modification requirements, including the Part 124 public review and comment requirements. *Id.* The existence of these requirements means that the petitioner will have an opportunity to comment on any future expansion if and when it occurs.⁷ Accordingly, any consideration of what PREPA might or might not do in terms of future expansion of the facility is premature and not appropriate for consideration in this proceeding. Review of this issue is therefore denied.

Petitioner lastly contends that the Region "violat[ed] its own law" by allowing PREPA to commence construction of the CCTP before the permit was issued. Petition at 2. The petition does not state, however, precisely what activities PREPA allegedly undertook prior to issuance of the permit that violated any applicable law or regulation. The Region has explained that in response to comments on this issue it conducted an inspection of the CCTP site and determined that PREPA was engaged only in activities that are allowable under the Clean Air Act and implementing regulations, such as site clearing and ground preparation. Response to Petition at 19-20. Petitioner has not explained how the Region's inspection and the conclusions drawn therefrom are in error; nor has petitioner provided any information to support its claim that PREPA was engaged in non-allowable activities prior to permit issuance, much less provided any reason for

⁶The article was not provided with the petition, although the petition states that a copy was included. Petition at 2.

The Region contends that this issue was not raised during the public comment period, and therefore was not preserved for review. However, because the alleged article appeared after the close of the public comment period, the Region acknowledges that the issue might not have been "reasonably ascertainable" during the public comment period. Response to Petition at 5-6; *see* 40 C.F.R. § 124.13 (commenters obliged to raise reasonably ascertainable issues during public comment period). We therefore decline to deny review on the basis that the issue was not preserved for review.

⁷PREPA does not expressly deny that it might at some future time expand the facility, but states that "it is obvious that [any expansion] will constitute a major modification to the facility which will trigger a new PSD review process." PREPA's Motion to Request Denial at 5.

believing that engaging in any such activities would require changes in the conditions of the permit.⁸ Review on the basis of this issue must therefore be denied. *See SEI Birchwood* at 3.

For the foregoing reasons, the Board hereby denies CEDDA's petition for review of Region II's decision to issue a final PSD permit to PREPA.

So ordered.

⁸Moreover, even if PREPA had engaged in unauthorized preconstruction activities, those activities would be matters normally addressed by the Region in an enforcement action against PREPA for violating the statutory prohibition against commencing construction of a major air pollution source prior to obtaining a PSD permit. CAA § 165(a)(1), 42 U.S.C. § 7475(a)(1) ("No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless--(1) a permit has been issued for such proposed facility in accordance with this part * * *."). Thus, absent facts suggesting that the conditions of the permit would be affected in some manner by unauthorized preconstruction activities, there is no reason to consider those activities in a permit proceeding.